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No. 95-714

In the Supreme Court of the United States

OCTOBER TERM, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.,
PETITIONERS

v.

HENRY CISNEROS, SECRETARY, DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
JESSICA DUNSAY SILVER
SAMUEL R. BAGENSTOS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 24 C.F.R. 100.70(d), which makes it unlawful to discriminate in the terms and conditions of homeowners' insurance, is a permissible construction of the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, which prohibits "mak[ing] unavailable * * * a dwelling to any person because of race, color, religion, sex, familial status, or national origin," 42 U.S.C. 3604(a), and which prohibits discrimination "in the provision of services * * * in connection" with the sale or rental of a dwelling. 42 U.S.C. 3604(b).

2. Whether the regulation applying the Fair Housing Act to insurance practices operates on its face to "invalidate, impair, or supersede" Ohio insurance regulations and therefore contravenes the McCarran-Ferguson Act, 15 U.S.C. 1012 *et seq.*

3. Whether the possibility that the Department of Housing and Urban Development will apply a disparate impact test to insurers impairs the facial validity of the regulation applying the Fair Housing Act to insurance practices.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 52 F.3d 1351. The opinion of the district court (Pet. App. 85-92) is not yet reported. The report and recommendations of the magistrate judge (Pet. App. 30-84) are also not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1995. A timely petition for rehearing was denied on August 4, 1995. The petition for a writ of certiorari was filed on November 2, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a facial challenge to a regulation promulgated by the Secretary of the Department of Housing and Urban Development. The regulation in question, 24 C.F.R. 100.70(d)(4), provides that discrimination in the provision of homeowners' insurance is a discriminatory housing practice that violates the Fair Housing Act, 42 U.S.C. 3601 *et seq.* The Secretary adopted the regulation in 1989, a year after Congress extended to him the authority to promulgate legislative rules to implement the Act. See 42 U.S.C. 3614a. The regulation codified the interpretation of the Act adhered to by the Department of Housing and Urban Development since at least 1978. Pet. App. 3. In interpreting the Act to bar discrimination in the provision of homeowners' insurance, the Secretary concluded that the discriminatory denial of homeowners' insurance "make[s housing] unavailable" in violation of 42 U.S.C. 3604(a), and that it constitutes discrimination in providing "services * * * in connection" with the sale of a house, in violation of 42 U.S.C. 3604(b).

1. The Fair Housing Act charges the Secretary of the Department of Housing and Urban Development with the responsibility for receiving, investigating and, in many cases, adjudicating charges of housing discrimination. Pet. App. 3; 42 U.S.C. 3612. The Act also empowers the Secretary to certify state and local agencies authorized to enforce state or local fair housing laws that are "substantially equivalent" to the Fair Housing Act with respect to the substantive rights protected, procedures followed, and judicial

review available. 42 U.S.C. 3610(f)(3)(A). The Dayton Human Relations Council has been certified as an agency that protects "substantially equivalent" rights under the fair housing provisions of local ordinances, and it assists the Secretary "in the local administration of housing discrimination complaints under the Fair Housing Act." Pet. App. 3.

In May of 1990, Steven and Jennifer Beavers filed a complaint with the Secretary; they alleged "that Nationwide had cancelled their homeowner's insurance because of their race and/or place of residence." Pet. App. 4. The Secretary referred the complaint to the Council, "which determined that it was 'probable' that Nationwide had violated the City of Dayton's fair housing ordinances." *Ibid.* On September 28, 1990, another individual filed a complaint with the Secretary; she alleged "that Nationwide had refused, because of her sex, race and the racial make-up of the area, to reinstate her insurance policy on a residential building that was located in a predominantly black area of Toledo, Ohio." Pet. App. 4-5. Those two complaints were under investigation by the Council and the Secretary, respectively, when petitioners brought this suit. Pet. App. 5. "Both investigations have been held in abeyance pending the conclusion of this case." *Ibid.*

2. Petitioners initiated this action on May 6, 1991, in the United States District Court for the District of Columbia. Pet. App. 5. The complaint named as defendants Jack Kemp, then the Secretary of the United States Department of Housing and Urban Development, Jerald L. Steed, Executive Director of the Dayton Human Relations Council, and the Reverend Charles Brown, Chair of the Council. *Ibid.* Petitioners later added the City of Dayton as a

defendant. *Ibid.* Petitioners sought a declaratory judgment that the defendants lack authority, under the federal Fair Housing Act or local Dayton ordinances, to regulate the provision or cancellation of property and hazard insurance. Pet. App. 32. Petitioners also sought injunctive relief to prevent the defendants from investigating or hearing complaints regarding insurance underwriting practices. *Ibid.* Petitioners claimed, *inter alia*, that the Secretary's regulation prohibiting insurance discrimination was inconsistent with the Fair Housing Act, which does not specifically refer to discrimination in the provision of insurance. *Ibid.* Petitioners also claimed that the regulation contravened the McCarran-Ferguson Act, 15 U.S.C. 1001 *et seq.*, which prohibits the construction of a general federal statute so as to "invalidate, impair, or supersede" any state law regulating the business of insurance. Pet. App. 32. The case was transferred to the United States District Court for the Southern District of Ohio after certain defendants moved for a change of venue pursuant to 28 U.S.C. 1404(a). Pet. App. 5.

Both the Secretary and the Dayton defendants moved to dismiss the complaint on jurisdictional grounds. Pet. App. 35-46. In his motion, the Secretary argued that the issues presented by the case were not ripe for judicial review. Pet. App. 35-44. The parties also filed cross motions for summary judgment on the merits. Pet. App. 46-76. The district court referred the matter to a magistrate judge. The magistrate judge concluded that the validity of the Secretary's regulation is a purely legal issue ripe for judicial review and recommended denying the Secretary's motion to dismiss. Pet. App. 36-44. On the merits of petitioners' challenge, the magistrate

judge concluded that the Secretary's regulation was entitled to deference as a permissible construction of the Fair Housing Act (Pet. App. 49-58); that the Secretary's construction was, in any event, correct (Pet. App. 58-67); and that application of the Fair Housing Act to insurance practices did not contravene the McCarran-Ferguson Act (Pet. App. 67-73). Accordingly, the magistrate judge recommended granting the Secretary's motion for summary judgment. Pet. App. 76. After considering objections filed by petitioners, the district court adopted the magistrate judge's recommendations and ordered judgment for the defendants. Pet. App. 85-92.

3. Petitioners appealed, and the Sixth Circuit affirmed. Pet. App. 1-29. The court concluded that the Secretary's regulation was entitled to deference as a permissible construction of the Fair Housing Act. Pet. App. 6-19. Applying the test set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court first inquired whether Congress had directly spoken to the question whether discrimination in homeowners' insurance violated the Fair Housing Act. Pet. App. 8-9. Following the Seventh Circuit's decision in *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993), the court concluded that the broad statutory text was ambiguous and that petitioners "failed to show any evidence of Congressional intent to preclude the application of the Fair Housing Act to insurance underwriting practices." Pet. App. 15. The court then concluded that the Secretary's interpretation of the Act was a reasonable one "in light of the direct connection [between the] availability of property

insurance and ability to purchase a house." Pet. App. 16-18.

The court of appeals also concluded that the Secretary's regulation did not, on its face, contravene the McCarran-Ferguson Act. Pet. App. 19-27. Because the McCarran-Ferguson Act prevents the construction of general federal statutes to impair state laws that regulate the business of insurance, 15 U.S.C. 1012(b), the court considered whether application of the Fair Housing Act to discrimination in homeowners' insurance would impair any specific Ohio insurance law. The court concluded that, as applied to intentional discrimination, the Secretary's regulation clearly did not conflict with any state law. Pet. App. 26-27. Ohio insurance law prohibits "unfair discrimination," and petitioners conceded that no state law permitted or required insurers intentionally to discriminate on the basis of race. Pet. App. 20-21.

With respect to petitioners' principal ground for challenging the regulation under the McCarran-Ferguson Act—that the Secretary might apply a disparate impact analysis to insurance discrimination claims and that such an analysis might conflict with state law—the court found the claim not to be ripe for judicial review. It reasoned that the legal standards that would be applied under a disparate impact test were unclear, and that the determination whether a disparate impact test would conflict with state law would be best addressed in the context of a specific factual setting. Pet. App. 24-26.

Judge Kennedy dissented. Pet. App. 29. She concluded that "Congress did not intend for the Fair Housing Act to reach the activities of the insurance industry." *Ibid.* Because she believed that congres-

sional intent could be ascertained through "traditional tools of statutory construction," Judge Kennedy found it unnecessary to defer to the Secretary's construction. *Ibid.*

4. Petitioners filed a timely petition for rehearing with a suggestion for rehearing en banc. Pet. App. 94-95. The panel denied the petition for rehearing, with Judge Kennedy again dissenting. *Ibid.* No judge requested a vote on the suggestion for rehearing en banc. Pet. App. 94.

ARGUMENT

Petitioners present a facial challenge to the Department of Housing and Urban Development's regulation providing that discrimination in the provision of property or hazard insurance is a discriminatory housing practice in violation of the Fair Housing Act. That regulation was adopted pursuant to express congressional delegation. It permissibly implements two of the Act's broad prohibitions: (1) the prohibition on "mak[ing] unavailable * * * a dwelling to any person because of race, color, religion, sex, familial status, or national origin," 42 U.S.C. 3604(a); and (2) the prohibition on discrimination "in the provision of services * * * in connection" with the sale or rental of a dwelling, 42 U.S.C. 3604(b). Both circuits to have addressed the validity of the Department's regulation have upheld it as a reasonable construction of the Act, and every circuit to have considered the question has concluded that application of the Fair Housing Act to discrimination in the provision of insurance does not violate the McCarran-Ferguson Act.

1. The Fair Housing Act establishes a series of prohibitions on discriminatory housing practices.

Among those prohibitions, the Act makes it unlawful (42 U.S.C. 3604 (emphasis added)):

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services or facilities in connection therewith*, because of race, color, religion, sex, familial status, or national origin.

When it amended the Act in 1988, Congress explicitly authorized the Secretary of the Department of Housing and Urban Development to issue legislative rules to implement the Act. 42 U.S.C. 3614a. Pursuant to that authority, the Secretary promulgated final regulations in 1989. 54 Fed. Reg. 3232 (Jan. 23, 1989). The regulations interpret the Act to prohibit discrimination in the provision of insurance; they define "other prohibited sale and rental conduct" to include (24 C.F.R. 100.70(d)(4)):

> Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

This case involves a facial challenge to that regulation.

This Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S.

837 (1984), provides the standard for reviewing an agency's legislative rules interpreting a statute it administers. As the Court recently summarized *Chevron*'s "now familiar" test (*Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995)):

> [W]e inquire first whether 'the intent of Congress is clear' as to 'the precise question at issue.' If so, 'that is the end of the matter.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'

(quoting *Chevron*, 467 U.S. at 842-843). The court of appeals properly applied that test and correctly concluded that the Secretary's regulation prohibiting insurance discrimination is valid.

a. The court of appeals found no "evidence of Congressional intent to preclude the application of the Fair Housing Act to insurance underwriting practices." Pet. App. 15. That conclusion was correct. The starting point for determining congressional intent is the statutory text. In the case of the Fair Housing Act, that text is written in broad terms: it is unlawful to "make unavailable" a dwelling because of race or to discriminate on the basis of race in providing "services" in connection with the sale or rental of a dwelling. Nothing in that text provides a basis for concluding that Congress intended to exclude insurance practices from its coverage. Instead, "[b]y writing its statute in the passive voice—banning an outcome while not saying who the actor is, or how such actors bring about the forbidden consequence—Congress created ambiguity." *NAACP* v.

American Family Mut. Ins. Co., 978 F.2d 287, 298 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993).

The petition for certiorari does not present any argument that the statute unambiguously excludes the provision of insurance from its coverage. In the court of appeals, petitioners claimed that traditional canons of construction established that the Fair Housing Act does not prohibit insurance discrimination. See *Chevron*, 467 U.S. at 843 n. 9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). The court of appeals correctly concluded that the canons of construction identified by petitioners did not demonstrate a clear congressional intent to exclude insurance from the Act's coverage.

Below, petitioners pointed to two principles of statutory construction. They first contended that the *ejusdem generis* principle required the general term "otherwise make unavailable or deny" to be limited to objects that directly affect the availability of a dwelling like the specific terms preceding it: "refuse to sell or rent" and "refuse to negotiate for the sale or rental." The court of appeals recognized, however, that petitioners' argument merely begs the question whether denial of property insurance does in fact operate directly to render housing unavailable (Pet. App. 10-11)—precisely the type of "judgment[] about the way the real world works * * * that agencies are better equipped to make than courts."

Pension Benefit Guaranty Corp. v. *LTV Corp.*, 496 U.S. 633, 651 (1990).[1]

Second, petitioners contended that the *expressio unius* maxim foreclosed application of the Act to discriminatory insurance practices. Petitioners noted that one provision of the Act (42 U.S.C. 3605) specifically prohibits discrimination in mortgage lending. They argued that such a specific prohibition would be superfluous if the "otherwise make unavailable" language of 42 U.S.C. 3604(a) could also be applied to practices like mortgage discrimination that effectively deny the availability of housing. But application of the *expressio unius* maxim does not demonstrate a clear legislative intent to limit the scope of Section 3604, particularly in light of the broad language of that provision. This Court has long

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[1] The lower courts have interpreted the term "otherwise make unavailable or deny" in Section 3604(a) to cover a variety of discriminatory practices that are not expressly mentioned in the statute, and that have a clear, although indirect, effect on the availability of housing. See, *e.g.*, *Heights Community Congress* v. *Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985) (real estate steering), cert. denied, 475 U.S. 1019 (1986); *United States* v. *City of Parma*, 661 F.2d 562, 574-576 (6th Cir. 1981) (City's failure to adopt resolution of goodwill, rejection of low-income housing, and adoption of land use ordinances with discriminatory impact), cert. denied, 456 U.S. 926 (1982); *Metropolitan Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (municipal refusal to rezone land to permit construction of low-income housing), cert. denied, 434 U.S. 1025 (1978); *Kennedy Park Homes Ass'n, Inc.* v. *City of Lackawanna, N.Y.*, 436 F.2d 108 (2d Cir. 1970) (refusal to permit sewer hookup), cert. denied, 401 U.S. 1010 (1971); *United States* v. *American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977) (discrimination by real estate appraisers), appeal dismissed, 590 F.2d 242 (7th Cir. 1978).

noted the generous scope of the Fair Housing Act's provisions. See *City of Edmonds* v. *Oxford House, Inc.*, 115 S. Ct. 1776, 1780 & 1783 n.11 (1995); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). Against that backdrop, the court of appeals correctly concluded "that §§ 3604 and 3605 overlap and are not mutually exclusive." Pet. App. 12. As the Seventh Circuit has noted, "[c]onveying meaning to diverse interpreters for an uncertain future is a difficult business. A wise drafter may state a principle in one section and list some applications of that principle in another, to make pellucid what ought to be apparent but which some judges (and many lay persons) will miss unless spelled out." *American Family Mut. Ins. Co.*, 978 F.2d at 298.

b. Because the Fair Housing Act is "silent or ambiguous" regarding its application to insurance, the Secretary's regulation outlawing discriminatory insurance practices must be upheld if it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; see also *Trafficante*, 409 U.S. at 210 (concluding, even before Congress's grant of legislative rulemaking authority, that the Secretary's construction of the Fair Housing Act was "entitled to great weight"). To be permissible, the Secretary's construction need not be "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11.[2]

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[2] Although there is some tension between the decision below and the Fourth Circuit's decision in *Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), the two cases do not conflict. *Mackey* was decided four years before the Secretary had authority to issue legislative rules implementing the Act, and five years before the Secretary promulgated a regulation defining insurance discrimination as a discriminatory housing

The court of appeals correctly concluded that the Secretary's construction is permissible. Obtaining homeowners' insurance is an integral part of the process of buying a house. Property insurance therefore falls within a natural reading of the term "services * * * in connection" with the purchase or sale of a dwelling. *American Family Mut. Ins. Co.*, 978 F.2d at 298.[3] In addition, there is no question that discriminatory denial of property insurance "make[s] housing unavailable." The Secretary has long recognized that lenders ordinarily require their borrowers to secure property insurance. See *Dunn* v. *Midwestern Indemnity Mid-American Fire & Casualty Co.*, 472 F. Supp. 1106, 1109 n.7 (S.D. Ohio 1979) (citing Memorandum of the General Counsel of Housing and Urban Development to Chester McGuire, Ass't Sec'y for Equal Opportunity (Aug. 15, 1978)). An individual who cannot obtain insurance will be unable to obtain a mortgage and, for that reason, unable to obtain a house. *Dunn*, 472 F. Supp. at 1109. In promulgating regulations to implement the Act, the Secretary

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practice. *Mackey* thus involved the court's own interpretation of the statute, not the permissibility of the Secretary's interpretation. "No matter how a court should have understood the Fair Housing Act in 1984, * * * the question today is whether the Secretary's regulations are tenable." *American Family Mut. Ins. Co.*, 978 F.2d at 301.

[3] Petitioners point (Pet. 14 n.20) to the Fourth Circuit's statement that "services" in the statute "encompasses such things as garbage collection and other services of the kind usually provided by municipalities." *Mackey*, 724 F.2d at 424. As the Seventh Circuit concluded, however, there is simply no basis for that restricted reading of the term "services." *American Family Mut. Ins. Co.*, 978 F.2d at 299 ("[I]t is hard to understand § 3604 as restricted to garbage collection and like services.").

therefore concluded that "discrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including refusals to provide municipal services or adequate property or hazard insurance, * * * render housing unavailable in violation of the Fair Housing Act." 54 Fed. Reg. 3232, 3240 (1989) (preamble to final rule).

In the court of appeals petitioners made two arguments in addition to their statutory construction argument, see *supra* pp. 10-12, for limiting the scope of the broad language in Section 3604. First, they relied on the absence of any reference to insurance in the Act's legislative history. As this Court has held, however, broad statutory language cannot be limited to the examples of its application set forth in the legislative history. *Pension Benefit Guaranty Corp.*, 496 U.S. at 649. Petitioners suggested below that a different rule should apply here because in the same year Congress enacted the Fair Housing Act it also enacted the Urban Property Protection and Reinsurance Act of 1968, Pub. L. No. 90-448, Tit. XI, 82 Stat. 555 (codified as amended at 12 U.S.C. 1749bbb *et seq.*) (UPPRA). UPPRA established a scheme of riot reinsurance designed to assure that property insurance would be available in depressed urban areas. Because of the different purposes of the two statutes, the court of appeals correctly concluded that "the enactment of UPPRA does not shed light on Congress' intent regarding the application of the Fair Housing Act to insurance underwriting practices." Pet. App. 14. There is no reason to believe that Congress's decision to provide an economic incentive for insurers to serve economically depressed areas entailed a decision to foreswear any federal statutory protection against racial discrimination in the pro-

vision of homeowners' insurance. The passage of UPPRA provides no basis for artificially limiting the broad language of the Fair Housing Act.

Second, petitioners argued below that the Act's subsequent legislative history demonstrated that Congress intended not to cover insurance. Petitioners pointed to the fact that, several years after the statute's enactment, Congress defeated proposals to make explicit that the Act covered discriminatory insurance practices. The court of appeals correctly rejected that argument. Pet. App. 14-15; accord *American Family Mut. Ins. Co.*, 978 F.2d at 299-300. This Court has long held that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guar. Corp.*, 496 U.S. at 650 (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)).

c. Petitioners contend that it was improper for the court of appeals even to apply the *Chevron* deference analysis here. Although petitioners do not make a sustained argument on this point, their discussion suggests two reasons for reaching that conclusion. Neither is persuasive.

First, petitioners suggest that the issue here is a "pure question of statutory construction," and that administrative constructions are entitled to no deference on those questions. Pet. 15. That is incorrect. It is undisputed that if a court can ascertain Congress's intent on the precise question at issue—either in the plain language of the statute or through the traditional tools of statutory construction—then "that intention is the law and must be given effect."

Chevron, 467 U.S. at 843 n.9. Absent an unambiguous expression of congressional intent, however, an agency's interpretation of a statute that it is empowered to administer is entitled to deference. Petitioners do not point to a single case to the contrary. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), this Court declined to accord deference to a construction arrived at in an agency adjudication, because that interpretation was inconsistent with the statute's "plain language" (*id.* at 432) and therefore "contrary to clear congressional intent." *Id.* at 447-448 (quoting *Chevron*, 467 U.S. at 843 n.9). And in *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987), this Court reaffirmed *Chevron*'s holding that its "first job" in answering "a pure question of statutory construction" is to attempt to discern Congress's intent and that, "where the statute is silent or ambiguous with respect to the specific issue," deference is required. *Id.* at 123 (internal quotation marks omitted). The Court then upheld the administrative construction on the basis of that *Chevron* analysis. See *id.* at 133-134 (Scalia, J., concurring). Because the Fair Housing Act is "silent or ambiguous" regarding coverage of insurance practices, the Secretary's regulation is entitled to deference under that holding.

Second, petitioners suggest that deference is not appropriate here because the question involves one of agency jurisdiction. Pet. 15-16. But rather than establishing a jurisdictional rule, the Secretary's regulation resolves a question of the Act's substantive coverage: whether homeowners' insurance is a "service[] * * * in connection" with the sale of a dwelling, and whether denial of homeowners' insurance "make[s a dwelling] unavailable." In concluding

that the discriminatory denial of homeowners' insurance comes within that language, the Secretary has made "a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866; cf. *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944) (determining "who is an employee" covered by the National Labor Relations Act is a "task * * * assigned primarily to" the Board); *NLRB* v. *Town & Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995) (same).

2. Petitioners contend that the Secretary's regulation applying the Fair Housing Act to insurance discrimination contravenes the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.* The court of appeals correctly rejected that contention. Pet. App. 27. Indeed, every circuit to have addressed the issue has concluded that application of the Fair Housing Act to discrimination in homeowners' insurance does not violate the McCarran-Ferguson Act. See *American Family Mutual Ins. Co.*, 978 F.2d at 295-297; *Mackey*, 724 F.2d at 421.

a. In enacting the McCarran-Ferguson Act, Congress's "primary concern" was to "ensure that the States would continue to have the ability to tax and regulate the business of insurance." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 217-218 (1979). To that end, Congress protected state laws regulating insurance from inadvertent preemption by federal statutes: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b).

As the statutory language makes clear, the McCarran-Ferguson Act does not dictate "unqualified deferral to state law." *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 525 (1993). The mere fact that a state regulates insurance does not prevent the application of a general federal statute to insurance practices; rather, the McCarran-Ferguson Act applies only where the federal statute's application would "invalidate, impair, or supersede" some specific state law regulating insurance. This Court has at least implicitly recognized that the statutory text requires a showing of a specific conflict between some particular state law and the federal statute at issue. See *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2211 (1993) (McCarran-Ferguson Act imposes "a rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise"). The lower courts have made that recognition explicit. See, *e.g.*, *Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co., Inc.*, 50 F.3d 1486, 1489 (9th Cir. 1995); *American Family Mut. Ins. Co.*, 978 F.2d at 295-297; *Mackey*, 724 F.2d at 421; *Cochran* v. *Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979). In light of those principles, the mere fact that Ohio regulates insurance does not preclude application of the Fair Housing Act to discriminatory insurance practices in that state. "The presence of a general regulatory scheme does not show that any particular state law would be invalidated, impaired or superseded by the application of the Fair Housing Act." *Mackey*, 724 F.2d at 421.

b. In asserting that the Secretary's regulation conflicts with state law, petitioners and the court of

appeals have distinguished two different types of Fair Housing Act claims: disparate treatment claims and disparate impact claims. With regard to disparate treatment claims—that is, claims of intentional discrimination—petitioners have not demonstrated how enforcement of the Secretary's regulation would create a conflict with a state statute. Nor could they, for no Ohio statute authorizes or requires insurers intentionally to discriminate on the basis of race. Indeed, the Ohio Insurance Code expressly forbids "unfair discrimination between individuals of the same class and of essentially the same hazard." Ohio Rev. Code Ann. § 3901.21(M) (Anderson Supp. 1994). And the Ohio Civil Rights Act prohibits discrimination in the terms and conditions of "fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located." Ohio Rev. Code Ann. § 4112.02(H)(4) (Anderson 1995). The Ohio Civil Rights Act, like the Fair Housing Act, provides private civil remedies, jury trials, and compensatory and punitive damages. *Id.* § 4112.051. Such "[d]uplication is not conflict." *American Family Mut. Ins. Co.*, 978 F.2d at 295.

In the court of appeals, petitioners' challenge focused on the application of the Secretary's regulation to disparate impact claims. Petitioners asserted that requiring insurers to avoid practices that are discriminatory in effect would be inconsistent with the state law prohibiting "unfair discrimination" among risks. Even if petitioners' assertion were correct, the facial challenge to the Secretary's regulation would still fail. A party challenging the facial

validity of a regulation faces the "heavy burden" of establishing that no set of facts exists under which the regulation would be valid. *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991). Because the Secretary's regulation is clearly valid at least as applied to disparate treatment claims, the suggestion that it might be improper to apply the Fair Housing Act to disparate impact claims (or to some subcategory thereof) does not serve as a basis for invalidating the regulation on its face.

c. In any event, petitioners have not demonstrated that applying disparate impact analysis to insurance discrimination would facially conflict with Ohio law and thus be inconsistent with the McCarran-Ferguson Act. First, Ohio's broad civil rights statute may already incorporate a prohibition on insurance practices that are discriminatory in effect. As noted, the Ohio Civil Rights Act explicitly applies to insurance practices, and it provides remedies similar to those available under the Fair Housing Act. The language of the Ohio statute "tracks the language" of the Fair Housing Act, *Aloqaili* v. *National Housing Corp.*, 743 F. Supp. 1264, 1272 (N.D. Ohio 1990), and at least one state court has held that the state law "appears to contain language more favorable for maintaining a housing discrimination suit than the federal Fair Housing Act." *Toledo Fair Housing Center* v. *Nationwide Mut. Ins. Co.*, No. 93-1685 (Ohio Ct. Common Pleas of Lucas County, Dec. 28, 1993), slip op. 3-4. Thus, to the extent that the Secretary's regulation prohibits insurance practices that are discriminatory in effect, it is likely that Ohio law already incorporates a similar prohibition.

Second, petitioners have not shown how disparate impact enforcement of the Secretary's regulation will

conflict with the state-law prohibition on unfair discrimination among risks. Petitioners appear to contend that application of an effects test to insurance practices will require them to make underwriting decisions that are prohibited by state law or vice versa. But petitioners have not identified *any* specific underwriting practices that they believe an effects test will prevent them from employing, nor have they explained why those practices would be required by state law. Any court considering a claim that an insurance practice violates the Fair Housing Act because of disparate impact would necessarily engage in a highly fact-specific analysis of the effects and of the claimed business justifications of the particular practice at issue. The court would examine precisely what effect the practice has on groups protected by the Act, as well as any business justification asserted in defense of the practice. See, *e.g.*, *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 934-937 (2d Cir.), aff'd, 488 U.S. 15 (1988). (That a practice was required by state law would of course be relevant in that inquiry.) Petitioners, however, have provided none of that information. They merely assert that compliance with the Fair Housing Act's prohibition on practices with a disparate impact will place them at risk of violating state "unfair discrimination" laws. Pet. 19. But the fact that application of an effects test to insurance discrimination might contravene the McCarran-Ferguson Act "under some conceivable set of circumstances is insufficient to render [the regulation] wholly invalid." *Rust*, 500 U.S. at 183 (internal quotation marks omitted). The court of appeals therefore

properly concluded that petitioners' challenge did not render the regulation invalid on its face.[4]

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[4] In concluding that petitioners' challenge did not render the regulation facially invalid, the court of appeals relied on the ripeness doctrine. Pet. App. 21-26. That reliance was slightly misleading. By resolving petitioners' facial challenge to the Secretary's regulation on the merits, the court of appeals implicitly recognized that petitioners' basic claim (challenging the application of the Fair Housing Act to insurance discrimination at all) presented a "purely legal" issue ripe for judicial review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). However, the court of appeals concluded that petitioners' subsidiary challenge to disparate impact enforcement of the Fair Housing Act was not yet fit for judicial resolution. Pet. App. 25-26. That conclusion was correct. Because petitioners have not identified any particular underwriting practice that they believe a disparate impact approach will prevent them from employing, petitioners' challenge presents merely an "abstract disagreement[] over administrative polic[y]." *Abbott Laboratories*, 387 U.S. at 148. Moreover, because any application of disparate impact analysis to a particular underwriting practice would involve a highly fact-specific inquiry into the effects of and business justifications for that practice, this is a case where "consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations." *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967). Those factors demonstrate that petitioners' anticipatory challenge to disparate impact enforcement of the Secretary's regulation is not yet ripe; they also demonstrate that the challenge does not impair the facial validity of the regulation. But whether the question is considered under the rubric of ripeness or of the appropriate limits on a facial challenge, the court of appeals was correct in rejecting petitioners' claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
JESSICA DUNSAY SILVER
SAMUEL R. BAGENSTOS
Attorneys

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